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in the

Supreme Court

of the

United States

OCTOBER TERM 1972

NO. 72-594

ROBERT GORDON MATHER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit

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MIAMI REVIEW — 371-4853 — 377-3731

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In the Supreme Court of the United States

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---

ROBERT GORDON MATHER, by undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on August 2, 1972.

OPINION BELOW

The opinion of the Court below is not yet reported. It is Fifth Circuit Case No. 72-1280, United States of America v. Robert Gordon Mather, decided on August 2, 1972, Petition for Rehearing and Rehearing en banc denied on September 13, 1972. A copy of the opinion and of the order staying the mandate until October 13, 1972, appears in the appendix to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 2, 1972. The timely Petition for Rehearing and Rehearing en banc was denied on September 13, 1972. Upon motion, the court below stayed the mandate until October 13, 1972, and this Petition was filed within the time allowed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I.

DOES THE JUDICIAL FORMULATION OF AN INFERENCE RULE ALLOWING INTENT TO DISTRIBUTE TO BE PRESUMED FROM SIMPLE POSSESSION OF COCAINE IN A PROSECUTION UNDER 21 U.S.C. §841(a) (1) DIRECTLY CONFLICT WITH AND VIOLATE THAT STATUTE WHICH DOES NOT PROVIDE FOR THE USE OF ANY INFERENCES?

II.

DOES THE RULE OF *TURNER V. UNITED STATES*, 396 U.S. 398 (1970) WHICH ALLOWS THE USE OF A STATUTORILY PERMITTED INFERENCE TO PROVE AN ESSENTIAL ELEMENT OF A NARCOTICS OFFENSE APPLY TO A PROSECUTION UNDER 21 U.S.C. §841(a) (1) WHICH CONTAINS NO STATUTORY INFERENCES?

III.

WHERE CONGRESS HAS PROSCRIBED BY SEPARATE STATUTES POSSESSION OF COCAINE, 21 U.S.C. §844(a), AND POSSESSION WITH INTENT TO DISTRIBUTE, 21 U.S.C. §841(a)(1), DOES A CONVICTION UNDER 21 U.S.C. §841(a)(1) VIOLATE THE DUE PROCESS CLAUSE WHEN THERE IS NO PROOF OF INTENTION TO DISTRIBUTE?

STATUTES INVOLVED

Title 21 U.S.C. §841(a)(1):

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally — (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;"

Title 21 U.S.C. §844(a):

"(a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both, except that if he commits such offense after a prior conviction or convictions under this subsection have become final, he shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

STATEMENT OF THE CASE

On November 9, 1971, ROBERT GORDON MATHER was detained by Eastern Airlines officials in Miami International Airport while preparing to board an Eastern flight from Miami to Atlanta, Georgia. He was escorted to a nearby room by an Eastern official, joined by a Deputy United States Marshal. Mather was detained because he ostensibly fit the "anti-hijack profile." The search of Mather revealed two envelopes which contained cocaine. He was arrested and charged with possession of a controlled substance, cocaine, with intent to distribute.

By stipulation, the government and the defense agreed that the facts adduced at the hearing on the Motion to

Suppress the 197.75 grams of seized cocaine would constitute the trial record. The district judge denied the Motion to Suppress, adjudicated the Petitioner guilty of violating 21 U.S.C. §841(a)(1) and sentenced him to two years imprisonment. Motions for Judgment of Acquittal and to Arrest the Judgment were filed and denied. Those motions raised, inter alia, the failure of the government to prove an essential element of the offense, i.e., "intent to distribute." The appeal raised the same issue.

It is undisputed that no evidence, other than mere possession, was presented to the trial court, and upon this evidence an inference of "intent to distribute" was made by the trial court and upheld by the Court of Appeals. Appendix, p. 4.

The Court of Appeals in its opinion of August 2, 1972, held that the mere possession of 197.75 grams of cocaine was sufficient to prove the intent to distribute element required by 21 U.S.C. §841(a)(1). The Court wrote:

> "The rule to be applied with respect to inferences is the rule which was applied in *Turner*: the inference is invalid 'unless it can at least be said with substantial assurance that the presumed fact [here intent to distribute] is more likely than not to flow from the proved fact on which it is made to depend' 396 U.S. at 404-405 (footnotes omitted) Appendix p. 7.

The Petition for Rehearing and for Rehearing en banc raised once again the issues raised herein and specifically pointed out that *Turner* involved *statutorily permitted* in-

ferences. That Petition was denied on September 13, 1972. Appendix, p. 8.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

The statutory scheme, of which 21 U.S.C. §841(a)(1) is a part, was enacted on October 27, 1970, as The Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91-513. Its purpose is to regulate the use of, and proscribe the importation and distribution of certain controlled substances designated by the Attorney General.

While hundreds of prosecutions have been brought under 21 U.S.C. §841(a)(1), this Court has never confronted the questions posed by the within Petition. The decision below cites no other case which has determined that proof of intent to distribute under 21 U.S.C. §841(a)(1) may be inferred. Indeed, none exist.

Thus, the questions presented are important ones of first impression.

Because of the dearth of appellate decisions and the numerous pending and future cases which will raise the same issue, Petitioner submits that an early resolution of the question by this Court will save needless expenditures of time, effort and money in the future.

The decision below now paves the way for trial and appellate judges to assess what amount of each of the multitude of controlled substances is more than one person can reasonably use. Such information is 'not within specialized judicial competence or completely commonplace' *Leary v. United States*, 395 U.S. 6, 38 (1969). The attempted performance of this task will strain the judicial workload. It is an unnecessary effort in light of 21 U.S.C. §844(a) which makes mere possession an offense in itself. Thus, Congress evidently believed that compliance with the statutory requirement of proof of intent to distribute was a pre-requisite for conviction under §841(a)(1).

Moreover, by adopting a rule allowing an inference of intent to distribute to be made, the court below has rewritten 21 U.S.C. §841(a)(1). Congress has the authority to "amass the stuff of actual experience and cull conclusions from it", *United States v. Gainey*, 380 U.S. 63, 67 (1965), and thereby create statutory presumptions. Courts cannot perform that function.

The failure of the Fifth Circuit to follow the mandate of Congress and the creation by the Fifth Circuit of the new "inference" rule presents an important question of federal law which must be resolved, as soon as possible by this Court.

2. THE DECISION BELOW HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND RESULTS IN A DEPRIVATION OF DUE PROCESS OF LAW.

Each of the decisions relied upon below involved statutes which *contained and permitted* the use of inferences. While several Second Circuit cases were referred to, especially *United States v. Gonzalez*, 442 F.2d 698 (2nd Cir. en banc, 1971), those opinions all looked to *Turner v. United States*, 396 U.S. 398 (1970). The rule of *Turner* adopted in the decision below is drawn from *Leary v. United States*, 395 U.S. 6, 36, (1969). The decision below noted the derivation of the rule. Appendix p. 7, n. 1.

Leary involved a *statutorily permitted* inference. The full quotation from *Leary*, repeated in *Turner* and a part of which became the heart of the decision below is:

> "The upshot of *Tot* [v. United States, 319 U.S. 463, (1943)], [United States v.] *Gainey*, 380 U.S. 63 (1965) and [United States v.] *Romano*, 382 U.S. 136 (1965) is, we think, that a *criminal statutory presumption* must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

Leary v. United States, 395 U.S. at 36 (emphasis supplied)

The holding of the Fifth Circuit was:

> "the rule to be applied with respect to inferences is the rule which was applied in *Turner:* the inference is invalid 'unless it can at least be said with substantial assurance that the presumed fact

> [here intent to distribute] is more likely than not to flow from the proved fact on which it is made to depend.' 396 U.S. at 404-405 (footnotes omitted) Appendix p. 7.

Clearly, the rule of *Turner* is not applicable to a statute which neither contains nor permits inferences. Thus the decision of the Fifth Circuit conflicts with the decisions of this Court, from *Tot* through *Turner*.

Absent any proof of intent to distribute and stripped of the inference rule, the case presents no evidence upon which a conviction could be based. Thus the adjudication of guilt by the trial court and its affirmance by the court below, violate due process of law. *Thompson v. Louisville*, 362 U.S. 199 (1960).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

Daniel S. Pearson

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October 10, 1972

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 12 day of October, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Michael Sullivan, Asst. U. S. Attorney, 14 Northeast First Avenue, Miami, Florida.

By Daniel S. Pearson
Daniel S. Pearson

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-1280

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT GORDON MATHER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(August 2, 1972)

Before BELL, GOLDBERG and RONEY, Circuit Judges.

BELL, Circuit Judge: This appeal is from a judgment of conviction entered by the district court without a jury, finding Mather guilty on an indictment which charged him with possessing 197.75 grams of cocaine with intent to distribute the same in violation of 21 USCA, §841(a)(1).

Prior to trial, the district court conducted a hearing on appellant's motion to suppress the cocaine which was

taken from him by federal marshals at Miami International Airport. The court denied the motion. Thereupon appellant waived jury trial and stipulated to the evidence received on the motion to suppress. The only problem in the case comes from the truncated fashion in which the matter was thereafter handled.

On this appeal, appellant contends that the district court erred in failing to grant the motion to suppress and thus in admitting the cocaine into evidence; that the evidence was insufficient to prove intent to distribute; and that 21 USCA, § 841(a)(1) is unconstitutional in that it does not require allegation or proof of movement in interstate or foreign commerce. We affirm.

I.

The seizure of the cocaine occurred after appellant had sought to board an Eastern Airlines flight to Atlanta, Georgia en route from South America. Acting with regard to an anti-hijacking profile, the ticket agent asked appellant to produce identification. Appellant replied that he had none. The agent then asked appellant to be seated, took his ticket, and summoned a supervisor. When the supervisor arrived, he was informed by the ticket agent that appellant was a selectee, i.e., a hijacking suspect. The supervisor then approached appellant and asked to see his identification. Appellant replied that his identification was in his luggage. It was at this time that the supervisor asked appellant "if he would voluntarily submit to a search by a United States Marshal." Appellant replied that he would.

Shortly thereafter a deputy United States Marshal arrived at the boarding gate and was informed that

appellant was a selectee and had voluntarily agreed to be searched. During the search that followed a marshal found the cocaine in an envelope in the inside pocket of appellant's jacket. It was identified by appellant at the time as cocaine.

There is nothing in the record to suggest that appellant's consent was coerced. There is no record of promises, threats, discourtesies, or inducements. He was told that the search would be conducted by federal officers. It follows that there was no error in the district court's refusal to suppress. Cf. Cockerhan v. Wainwright, 5 Cir., 1971, 444 F.2d 438. The question of consent is for the district court as the fact finder. United States v. Fike, 5 Cir., 1971, 449 F.2d 191; Perkins v. Henderson, 5 Cir. 1969, 418 F.2d 441; Landsdown v. United States, 5 Cir., 1965, 348 F.2d 405. The record supports the finding here.

Appellant's attack on the validity of 21 USCA, § 841 (a)(1) is without merit. The question has recently been decided adversely to him. United States v. Lopez and Llerena, 5 Cir., 1972, __ F.2d __ [No. 71-3248, slip opinion dated May 11, 1972].

II.

The last question presents the problem. Was the evidence sufficient on intent to distribute? The district court inferred intent to distribute the cocaine from the amount involved, 197.75 grams.

Following the hearing on the motion to suppress the cocaine, the request of appellant and his counsel for a non-jury trial was granted. It was stipulated that the

evidence adduced on the hearing to suppress would be admitted as the evidence on the trial. The court suggested that the report of chemist on the cocaine be introduced but counsel then stipulated as to the amount, 197.75 grams, and stated that the report would not be necessary.

The question of the validity of the inference turns on whether the amount of cocaine was such as will support an inference of intent to distribute as distinguished from mere possession for personal use. There is no proof that appellant did or did not use cocaine. There is no evidence as to what constitutes a normal dose or the general frequency of doses. We can assume from the stipulation that the cocaine was not mixed with other substances and was thus in the true amount of 197.75 grams.

We can obtain some guidance on the question from Turner v. United States, 1970, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610. That case involved the illegal importation of heroin and cocaine in violation of 21 USCA, § 174. This is not an importation case nor a heroin case. The analogous part of Turner is that having to do with the count charging the distribution of cocaine not in or from the original stamped package in violation of 26 USCA, § 4704(a). There the conviction was reversed as to that count on two grounds: (1) an insufficient foundation (mere possession), for the statutory inference which made a prima facie case of distribution; (2) an insufficient basis for the statutory inference of a purchase other than in or from the original stamped package. Only the first ground is applicable here.

The court concluded in Turner that the small amount of cocaine involved was insufficient to sustain the statu-

tory inference of possession with intent to distribute rather than possession for personal use. 396 U.S. at 422-23. The amount involved was a package weighing 14.68 grams containing a mixture of cocaine and sugar, 5% of which was cocaine. Thus only .73 of one gram of cocaine was in issue.

The court also concluded in Turner, 396 U.S. at 420, and fn. 30, that the amount of heroin in issue warranted the statutory inference with respect to the distribution of heroin under § 4704(a). The facts were that the heroin was in a package weighing 48.25 grams containing a mixture of which 15.2% was heroin. The mixture was contained within the package in 275 glassine bags.

Here appellant was in possession of 197.75 grams of cocaine en route from South America to Atlanta. We judicially know that it had a high value, worth in the neighborhood of $2,500 delivered. See United States v. Smart, 2 Cir., 1971, 448 F.2d 931, where 1,000 grams was worth from $12,000 to $13,000 delivered in New York from Bolivia.

The amount involved is far more than the Second Circuit found to be the minimum amount to preclude submitting the statutory inference to the jury in § 174 cases (illegal importation). United States v. Gonzalez, 2 Cir., 1971, 442 F.2d 698 (En banc). There the following supervisory rule was announced:

> "By our conclusion that the presumption of illegal importation under § 174 is valid where the possession of large quantities of cocaine is involved, we do not intend to limit our holding to quantities exceeding one kilogram. Obviously

the reasoning behind our conclusion is exactly as applicable to large quantities of cocaine, although less than a kilogram, as the Turner reasoning is to small quantities of cocaine, although more than a gram. In cases already tried and not yet decided on appeal, we must, in line with rationale of this opinion, decide each case on an individual basis. In doing so we must consider both the quantity of cocaine involved and the possibility of harmless error. With reference to cases yet to be tried, the district courts would be well advised to refrain from charging the statutory presumption as such except when the quantity is decidedly on the high side and to refrain from any charge of the presumption when the quantity is of the order of 10 grams or less. In cases between these extremes, the judge should frame instructions relating the facts as to importation of cocaine and as to thefts from legitimate sources, thereby permitting the jury to decide whether the quantity of cocaine is sufficient to justify a finding of illegal importation beyond a reasonable doubt." 442 F.2d at 709.

It is recognized, of course, that Gonzalez was concerned with the fact that proof of illegal importation does not always follow possession because of thefts of cocaine in this country. See also United States v. Armenteros, 5 Cir., 1971, 452 F.2d 1177, on the same question. Nevertheless, it constitutes some persuasion on the subject of amounts which are likely to be considered as small or personal to the possessor rather than possession for commercial purposes.

Finally, in this connection, we find another Second Circuit case to be of additional persuasion on the issue presented. In United States v. Contreras, 2 Cir., 1971, 446 F.2d 940, the amount of cocaine involved was 690 grams, 17.7% pure or a total of 121.13 grams. This was taken as a sufficient amount to uphold the statutory inference of distribution under § 4704(a) although there was some other evidence to support distribution.

The rule to be applied with respect to inferences is the rule which was applied in Turner: The inference is invalid "unless it can at least be said with substantial assurance that the presumed fact [here intent to distribute] is more likely than not to flow from the proved fact on which it is made to depend." 396 U.S. at 404-05.[1]

We are satisfied that the proved fact here of 197.75 grams of cocaine in the possession of a traveler en route from South America to Atlanta, without more, was sufficient to make a prima facie case of intent to distribute the cocaine. There the matter ends.

AFFIRMED.

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[1]Citing *Leary v. United States*, 1969, 395 U.S. 6 at 36, 89 S.Ct. 1532, 23 L.Ed.2d 57.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1230

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT GORDON MATHER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Aug. 2, 1972, 5 Cir., 1972, ____ F.2d ____).

(September 13, 1972)

Before BELL, GOLDBERG and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 72-1280

D. C. Docket No. 71-684-CR-EC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT GORDON MATHER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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Before BELL, GOLDBERG and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 2, 1972
Issued as Mandate:

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1280

Filed September 27, 1972

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT GORDON MATHER,
Defendant-Appellant.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issue of the mandate of this Court in said cause be, and the same is stayed to and including October 13, 1972, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order

of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Griffin B. Bell

UNITED STATES
CIRCUIT JUDGE

Dated: Sept. 25, 1972